No. 95-1187

(A)

Supreme Court, U.S.
FILED
MAR 13 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

COUNTY OF BERKS AND THE BERKS COUNTY BOARD OF ASSESSMENT APPEALS,

Petitioners,

vs.

MERRY J. MURTAGH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania

REPLY BRIEF FOR PETITIONERS

JOSEPH C. MOSSOP
CERULLO DATTE
& WALLBILLICH, P.C.
Special Counsel to Petitioner the Berks County Board of Assessment Appeals
Second Street and
Laurel Boulevard
Pottsville, Pennsylvania 17901
(717) 622-0767

DANIEL B. HUYETT
Counsel of Record
E. THOMAS HENEFER
STEVENS & LEE
Special Counsel to Petitioner the County of Berks
111 North Sixth Street
P.O. Box 679
Reading, Pennsylvania 19603
(610) 478-2000

8192
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

12 pp

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS . . . . . (i)

II. TABLE OF CITED AUTHORITIES . . . . . (ii)

III. INTRODUCTION 1

IV. ARGUMENT 1

A. The Court Has Jurisdiction to Hear This Appeal 1

B. Important Federal and State Policies Will Be Undermined, Not Advanced, If This Case Proceeds In State Court 5

V. CONCLUSION 8

II. TABLE OF CITED AUTHORITIES

Cases	Page
Behe v. Chester County Bd. of Assessment Appeals, 952 F.2d 66 (3d Cir. 1991)	6
Cedarbrook Realty, Inc. v. Nahil, 484 Pa. 441, 399 A.2d 374 (1979)	7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	3, 4
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	1, 2, 6
Greenwich Township v. Murtagh, 144 Pa. Commw. Ct. 624, 601 A.2d 1352, (1992)	7
Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963)	3
Mitchell v. Forsyth, 472 U.S. 511 (1985)	3
Murtagh v. County of Berks, et al., 535 Pa. 50, 634 A.2d 179 (1993), cert. denied, 114 S. Ct. 1397 (1994)	2, 5

National Private Truck Council, Inc. v. Oklahoma Tax Commission, Inc., 115 S. Ct. 2351 (1995) 1-6

Rochester & Pittsburgh Coal Co. v. Bd. of Assessment & Revision of Taxes, 438 Pa. 506, 266 A.2d 78 (1970) 7

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 6, 7

Statutes

Federal

28 U.S.C. §1257 3

42 U.S.C. §1983 . . . . . 1-3, 5, 6

State

72 Pa. C.S.A. §5349(c) 5

III. INTRODUCTION

Contrary to the Taxpayers' and Municipal Defendants' position, the Court has jurisdiction to review this case now, before the federal policies outlined in National Private Truck Council, Inc. v. Oklahoma Tax Commission, Inc., 115 S. Ct. 2351 (1995), are further eroded by continued litigation in state court of the Taxpayers' claims under 42 U.S.C. §1983. Moreover, certiorari should be granted now because the improper federal interference the Court prohibited in National Private Truck Council will have already occurred if the Court postpones review until all possible proceedings in state court are completed.[1]

IV. ARGUMENT

A. The Court Has Jurisdiction to Hear This Appeal

The Taxpayers argue that the jurisdictional standards of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), are not satisfied and that the Court should deny certiorari to minimize "federal court intrusion into state affairs." [Taxpayers' Brief at 6].

---

[1] Certiorari should also be granted to review the Pennsylvania Commonwealth Court's erroneous decision that the Municipal Defendants are not proper defendants. The County and the Board, however, believe that a reply brief is not required on that issue and instead rely on their petition for writ of certiorari.

Contrary to the Taxpayers' position, however, jurisdiction exists under Cox and the avoidance of federal interference with state affairs (in this case, local taxation) is the precise reason why the Court should grant certiorari.

Despite the possibility of further state court proceedings, jurisdiction exists under Cox because (a) the Pennsylvania Supreme Court has decided the federal issue incorrectly (the viability of Taxpayers' §1983 claims) in Murtagh v. County of Berks, et al., 535 Pa. 50, 634 A.2d 179 (1993), cert. denied, 114 S. Ct. 1397 (1994) ("Murtagh I"), and has refused to reconsider its decision in light of National Private Truck Council; (b) the federal issue will evade review if the County and Board prevail on non-federal grounds (such as the Taxpayers' failure to establish a lack of uniformity in local taxes under state law); (c) a reversal on the federal issue will preclude further litigation because the Taxpayers have asserted only a §1983 claim; and (d) a refusal to review this case now will erode the important federal policies identified in National Private Truck Council. 420 U.S. at 482-83.

The Taxpayers offer no credible argument why Cox does not apply. Instead, they claim "[t]here is no identifiable federal policy that will suffer if the state proceeding goes forward." [Taxpayers' Brief at 7]. They further argue that allowing the case to proceed in state court will advance "the federal interest in adjudicating §1983 disputes . . . ." [Taxpayers' Brief at 7].

The Taxpayers' federal policy argument could not be more at odds with National Private Truck Council, where the Court examined the long-standing federal policy of not interfering with local taxation. Under National Private Truck Council, no federal interests will be advanced by allowing this case to proceed; instead, important federal policies will be undermined by further litigation in state court.

Jurisdiction exists in cases like this, where a separate and independent federal issue (in this case wrongfully decided by the Pennsylvania Supreme Court) may determine whether a claim will proceed. Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963). There is jurisdiction here because the threshold question of whether the Taxpayers have viable §1983 claims is squarely presented in light of National Private Truck Council and the resolution of this separate and independent federal question may terminate the litigation. Mitchell v. Forsyth, 472 U.S. 511, 525 n. 8 (1985) ("state court decisions rejecting a party's federal law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. §1257.")

Finally, jurisdiction exists in cases where further proceedings remain in the state courts but an important federal interest or right protected by law cannot be vindicated without an immediate appeal. One example is Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), where the Court recognized that some rights can only be protected by immediate review

and are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Like Cohen, this case involves rights and federal interests that cannot be vindicated without immediate review. Indeed, if this case is returned to the trial court, the federal interference with local taxation prohibited by National Private Truck Council will only continue as this case (and others like it) are litigated throughout Pennsylvania's courts.[2] Simply put, by the time the proceedings in state court are concluded, the damage to the federal policies examined in National Private Truck Council will be done. Thus, as in Cohen, because an important federal policy can only be vindicated by immediate review, the Court should grant certiorari.

---

[2] The Municipal Defendants agree with the Petitioners that National Private Truck Council compels reversal, albeit in a different forum. As is evident from their Brief, however, the Taxpayers do not concede that National Private Truck Council requires the dismissal of their claims. Thus, if the case is returned to state court, protracted litigation and appeals can be expected even if the trial court dismisses the Taxpayers' claims. Such interference will be worse if the trial court refuses, despite National Private Truck Council, to dismiss the Taxpayers' claims.

B. Important Federal and State Policies Will Be Undermined, Not Advanced, If This Case Proceeds In State Court

Ignoring the important federal policies at issue, the Taxpayers advance several non-jurisdictional arguments for denial of certiorari. For example, they claim that Murtagh I furthers state interests by allowing §1983 class actions to avoid multiplicity of suits by individual taxpayers. [Taxpayers' Brief at 7-8]. This argument should be rejected for two reasons.

First, an action like this one, seeking tax refunds for a class consisting of every taxpayer who was allegedly assessed improperly over a ten year period, is perhaps the most intrusive kind of civil action because it attempts to use a federal remedy (under §1983) in a way that threatens the fiscal integrity of local governments. No state interests are advanced by such a proceeding. Second, Pennsylvania's statutory appeal provisions allow taxpayers to challenge assessments on a class basis. 72 Pa. C.S.A. §5349(c). A §1983 class action therefore does not advance state interests; it merely replaces adequate state remedies in a manner prohibited by National Private Truck Council.

Similarly, the fact that the Murtagh I court limited its holding to class (as opposed to individual) actions does not render this case inappropriate for review by this Court. Any difference between class and individual actions is a distinction without meaning

because the maintenance of any §1983 action to challenge local taxes in Pennsylvania is improper under National Private Truck Council.

Finally, the Taxpayers claim that an unresolved issue of state law (whether Pennsylvania's statutory remedies are adequate) is grounds to deny certiorari. [Taxpayers' Brief at 8]. This argument fails for two reasons.

First, this Court has not refused to hear important cases merely because subsidiary issues (that have earlier been addressed by intermediate appellate courts), have not been addressed by a state's highest court. Indeed, the Court recognized in Cox the importance of reviewing important federal questions in cases where the determination of subsidiary or independent issues in subsequent state court proceedings might affect the outcome of a case. 420 U.S. at 482-83.

Second, the adequacy of Pennsylvania's statutory remedies is not unresolved. To be adequate, Pennsylvania's statutory remedies need only allow taxpayers to raise constitutional challenges at an administrative hearing and appeal adverse decisions to higher state courts; the remedies need not be the best or most convenient remedies. Rosewell v. LaSalle National Bank, 450 U.S. 503, 512 (1981). Pennsylvania's statutory remedies satisfy these minimal standards. E.g., Behe v. Chester County Bd. of Assessment Appeals, 952 F.2d 66, 70 (3d Cir. 1991) (examining statutory provisions).

Pennsylvania's Supreme Court addressed the adequacy issue (and the standards later established in Rosewell) over twenty years ago when it held that taxpayers may raise constitutional challenges in state court so long as they exhaust administrative remedies. Rochester & Pittsburgh Coal Co. v. Bd. of Assessment & Revision of Taxes, 438 Pa. 506, 266 A.2d 78 (1970) (examining Fourth through Eighth Class County Assessment Law); Cf. Cedarbrook Realty, Inc. v. Nahil, 484 Pa. 441, 399 A.2d 374 (1979) (Third Class County Assessment Law's procedures for administrative hearing followed by judicial review satisfy taxpayers' rights to Due Process).

Importantly, here, although the Pennsylvania Supreme Court stated that it was not deciding the adequacy issue, the Commonwealth Court in Murtagh I explicitly found Pennsylvania's statutory procedures adequate to protect the Taxpayers' constitutional rights. Greenwich Township v. Murtagh, 144 Pa. Commw. Ct. 624, 636-37, 601 A.2d 1352, 1358-59 (1992). In short, there are no unresolved state law issues that undermine the compelling reasons for granting certiorari.

V. CONCLUSION

For the reasons set forth above, Petitioners Berks County and the Berks County Board of Assessment Appeals respectfully request the Court to grant their petition for writ of certiorari.

STEVENS & LEE
Daniel B. Huyett
E. Thomas Henefer
111 North Sixth Street
P.O. Box 679
Reading, Pennsylvania 19603
(610) 478-2000

Special Counsel to the County of Berks

CERULLO DATTE & WALLBILLICH, P.C.
Joseph C. Mossop
Second Street and Laurel Boulevard
Pottsville, Pennsylvania 17901

Special Counsel to the Berks County Board of Assessment